



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 654 OF 2013**

**In the Matter of the Estate of the Late Fredrick M'mutea**

**M'kiara Alias Fredrick M'ikira (Deceased)**

**SAMUEL M. M'BWIL.....PETITIONER**

**Versus**

**RAEL KATHAMBI FREDRICK.....OBJECTOR**

**JUDGMENT**

1. I am considering a summons for revocation and or annulment of grant dated 3<sup>rd</sup> July 2018 which is expressed to be brought pursuant to **Section 76 of the Law of Succession Act, Rule 44 (1) (2), 73 of the Probate and Administration Rules** and all other enabling provisions of the law. The grounds upon which the application is grounded upon are set out in the application and the affidavits sworn by Rael Kathambi Fredrick on 3<sup>rd</sup> July and 16<sup>th</sup> October 2018.

2. The major grounds for seeking revocation are:-

**i. The grant was obtained fraudulently by making of false statement of fact as it was obtained by the concealment from the court of something material.**

**ii. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.**

**iii. Particulars thereof were that:-**

**1. She is the surviving spouse of the deceased yet she had no knowledge of the cause and her consent was not obtained.**

**2. She and the other survivors were not served with citation and summons for confirmation of the grant.**

**3. The chief's letter used by the petitioner is written by the assistant chief Kiambogo sub-location in Timau while she resides in Mwirine village which is Meru Township and most definitely the assistant chief in Timau could not have known about the estate of the deceased or his beneficiaries thereof.**

3. She applied and had the grant of representation issued to her confirmed on 24<sup>th</sup> June 2015 in High Court Succession Cause No. 70 of 2013. According to her, one of the deceased's properties is land parcel No. **KIRIMARA/KITHITHINA BLOCK 1/451** measuring 0.748 Ha which was solely bequeathed to one Zipporah Kairuthi M'Ntombui. But the petitioner filed this cause secretly and caused the said parcel of land to be devolved to him and has transferred the land into his name. She as the surviving spouse and administrator neither gave her consent nor denounced her right over the estate. It was stated that, in Cause No. 70 of 2013 the beneficiaries of the estate agreed on distribution therefore the petitioner herein is a stranger and intruder.

**Petitioner's case**

4. The application was opposed through the replying affidavit of Samwel M'Mbwii sworn on 6<sup>th</sup> September 2018. It was deposed inter alia:-

**i. That it is not true that this cause was filed secretly for he was granted permission by this Honorable Court to file the cause**

following failure by the citee in citation number 490 of 2012 to file a reply thereto despite service of the citation on her.

ii. That the applicant was also duly served with the application for confirmation of grant but failed to respond. Thus, the grant was confirmed to him and land duly transferred to him.

iii. That he believes that this application is filed at the behest of his sister Zipporah Kairuthi M’Ntombui who claims that the land was bought by their father and that she is the rightful beneficiary.

iv. That the applicant has no interest in the land and she knows that it belongs to him.

5. This matter was canvassed way of written submissions. The applicant submitted that she was never served. But she pointed out that she is cited and no other beneficiary is. She referred to the return of service on record which she says is only in respect of the applicant and not the rest of the beneficiaries of the estate. That if the citor had the right to file this cause he did not follow the required procedure under **Section 51 of the Law of Succession Act** as he did not include either the widow or the children of the deceased. She insisted that **Rule 7 (1) and 26 of the Probate and Administration Rules** reiterates the procedure to be followed and details to be provided. The petitioner failed to obtain consent of the survivors of the deceased neither was there evidence to show that the said survivors had renounced their right to the estate. Therefore, they seek for the grant to be revoked. They relied on the cases of Ndunda Ndonge Mbiti v Joseph Makali Nzuki & another [2017] eKLR and In the Estate of Kariri Ndirangu alias S/O Ndirangu (deceased) [2018] eKLR.

6. On the other hand, the petitioner submitted that the applicant ranks in priority and she was rightly cited and served but failed to take action. The applicant claims that the other dependants of the deceased were not served but none of them has sworn an affidavit to back her claims. Due to the applicant’s failure an application of grant was presented which was served on the dependants of the deceased on several occasions but there was no appearance. Thus the judge exercised his discretion in considering the application under **Section 51 (4) of CAP 160** and allowed his application. Thus the application ought to be dismissed with costs.

#### ANALYSIS AND DETERMINATION

7. Are there grounds to revoke or annul the grant?

8. Grounds to revoke or annul a grant are set out in **Section 76 of the Law of Succession Act** as follows:

**“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—**

**(a) that the proceedings to obtain the grant were defective in substance;**

**(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

**(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—**

**(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or**

**(ii) to proceed diligently with the administration of the estate; or**

**(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**

**(e) that the grant has become useless and inoperative through subsequent circumstances.”**

9. The applicant argued that the grant was obtained fraudulently by making of false statement of fact as it was obtained by the concealment from the court of something material. As the surviving spouse of the deceased she stated that she had no knowledge of the cause and her consent was not obtained. She also claimed that the consent of the rest of the survivors was also not obtained. She stated that neither she nor the other beneficiaries was served with the citation which granted permission to the petitioner to file these proceedings. She also stated that she and all dependants were never served with the application for the confirmation of the grant. The petitioner affirmed that the citation and application was served upon them but they failed to act as required in law.

10. What does the law say on matters being raised? First and foremost, service of the citation as well as the summons for confirmation of grant is a major issue in controversy. Service of pleadings is not a technicality; it is in law, an essential part of fair trial. In the law of succession, service of pleadings especially citation and summons for confirmation must be served on the persons concerned; all persons cited and or beneficially entitled in an estate as he case may be. I am persuaded by the decision of Matheka J in In re Estate of Kariri Ndirangu alias Kariri S/O Ndirangu (Deceased) [2018] eKLR:

**“The respondents submit that the proceedings were started by way of citations and everyone was served. It is argued for the respondent that the applicants refusal/and or failure to cooperate was evident in the whole process.**

**It was incumbent upon the citor to ensure that every citee was properly served. The beneficial entitlement to inherit is personal. The widow is entitled to her share, and so are each of the children of the deceased. That is why each head counts when it comes to distribution, and why waiver is personal. The respondents have not established that each of those beneficially entitled to the estate was served with the citations or any other processes.**

...

**As submitted by the applicants this failure to effect proper service on the other beneficiaries is in violation of Rule 26 of the P&A’s Rules which clearly provides: -**

**1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as, or in priority to the applicant (emphasis mine)**

**This Rule is couched in mandatory terms. Notice cannot be equated to the disclosure of those beneficially entitled in the letter from the chief and the form P&A 5.**

11. By law, the citor must prove service of the citation upon the persons cited. Service of one or some of the persons cited is not service in accordance with the law. The petitioner being the citor has the obligation to prove that he served the citation accordingly. A thorough perusal of the record reveals no evidence of service of the citation in which permission to initiate this cause was granted. In the two affidavits of service sworn by Stanley Mworua M’Mbui on 17<sup>th</sup> April and 18<sup>th</sup> April 2015, the process server stated that he served the hearing notices. In the first affidavit, the process server stated that he served the applicant and on behalf of the others. In the second affidavit, he stated that he served all the beneficiaries who all declined service. The process server did not specify the particular persons served. In light of the nature of succession proceedings, details of the person served, where and how served are important. Generalized statements such as ‘the others’ and ‘all the beneficiaries’ are not appropriate in service of pleadings in succession proceedings. Even by the ordinary yardstick, the service described in the affidavits is not sufficient or proper service. From the record, the petitioner was aware of the beneficiaries of the estate. Consequently, I find that there was no or proper service of the citation and the application for confirmation of grant.

12. Another fatal lapse; when the petitioner petitioned for the letters of administration he failed to state the names of the surviving spouse and children as well as the assets and liabilities of the deceased as stipulated under **Section 51 of the Law of Succession Act**. The petitioner only stated that he is the only surviving beneficiary of which it is untrue; besides he has no relation to the deceased.

13. Accordingly I am satisfied that the grant of letters of administration intestate issued to Samuel M. M’Bwii on 19<sup>th</sup> February 2014 and confirmed on 19<sup>th</sup> May 2015 was obtained through concealment of material facts and misrepresentations. I hereby revoke it. As a consequence, title to Land Parcel No. Kirimara/Kithithina Block 1/451 shall be reverted back into the name of the deceased herein. I appoint the objector as the administrator of the estate. She shall take out such proceedings as are appropriate. It is so ordered.

**Dated, signed and delivered in open court at Meru this 28<sup>th</sup> day of January, 2019**

.....

**F. GIKONYO**

**JUDGE**

In presence of:-

M/S Wanjohi for M/s Muna for objector

Gatari for petitioner - absent

.....

**F. GIKONYO**

**JUDGE**